

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DOUGLAS E. LOY

Claimant

VS.

STATE OF KANSAS

Self-Insured Respondent

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Docket No. 264,079

ORDER

Respondent appealed the November 13, 2003 Award entered by Administrative Law Judge Jon L. Frobish. The Board placed this appeal on its summary calendar for disposition without oral argument.

APPEARANCES

Timothy A. Short of Pittsburg, Kansas, appeared for claimant. William L. Phalen of Pittsburg, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

On December 27, 2000, claimant fractured his left ankle during a break from his regular work duties. In the November 13, 2003 Award, Judge Frobish found claimant injured his left ankle when he slipped on ice on respondent's premises and, therefore, claimant's injury arose out of and in the course of his employment with respondent. Consequently, the Judge granted claimant benefits for a 40 percent permanent partial impairment to the left lower leg. The Judge also awarded claimant temporary total disability benefits from the date of accident through February 21, 2001, a period of eight weeks.

Respondent contends Judge Frobish erred. Respondent argues claimant tripped and fell while walking and, therefore, his accident occurred as the result of a risk of day-to-day living. Respondent argued, in part:

The law is clear that Employers are not responsible for injuries that result from a risk of day-to-day living. A simple trip and fall injury on a work break is clearly not a compensable claim in the State of Kansas. . . .¹

. . . .

The discovery deposition indicates that the Claimant, who was wearing cowboy boots at the time of the injury, suffered a broken ankle as the result of normal activities of day-to-day living, i.e. walking.²

Respondent also argues claimant provided different versions of the accident and, therefore, he has failed to prove that his left ankle injury is compensable under the Workers Compensation Act. Finally, respondent argues that claimant should not be awarded temporary total disability benefits as he received shared leave benefits during the period he missed work.

In short, respondent requests the Board to deny claimant's request for workers compensation benefits. In the alternative, respondent asks the Board to reduce claimant's award of permanent disability benefits from 40 percent to 17.5 percent and to either deny claimant's request for temporary total disability benefits or order claimant to repay respondent for the shared leave benefits that he received.

Conversely, claimant argues the Award should be affirmed. Claimant contends his accident was not caused by an activity of day-to-day living but argues, instead, the accident was caused "by the increased risks of the workplace (the ice and snow, and the defective curb)."³ Claimant also argues that he missed eight weeks of work due to his left ankle injury and, therefore, he is entitled to receive temporary total disability benefits for that period regardless of whether respondent paid him shared leave benefits.

The issues before the Board on this appeal are:

1. Did claimant's December 27, 2000 accident arise out of and in the course of his employment with respondent?
2. If so, what is the nature and extent of claimant's injury and disability?

¹ Respondent's Brief at 2 (filed Jan. 8, 2004).

² *Id.* at 3.

³ Claimant's Brief at 4 (filed Jan. 13, 2004).

3. If this accident is compensable under the Workers Compensation Act, is claimant entitled to receive temporary total disability benefits for the eight weeks he was unable to work or is respondent relieved from paying temporary total disability compensation because it paid claimant other benefits during the period in question?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The Award should be affirmed.

1. **Was claimant's injury caused by the natural aging process or by the normal activities of daily living?**

Claimant's December 27, 2000 accident arose out of and in the course of his employment with respondent. The evidence establishes it is more probably true than not claimant slipped and fell on that date due to the slippery condition of respondent's premises when he stepped outside during a break from his regular office duties.

Although there is some question whether claimant was stepping off the curb into the parking lot or merely turning to enter respondent's building, the evidence establishes it is more probably true than not claimant slipped and fell fracturing bones in his left ankle due to the slippery conditions of respondent's premises and, perhaps, due to a broken section of curb. Claimant's testimony that he slipped and fell due to the snowy condition of respondent's premises is supported by the testimony of Doug Ewing, who is the manager of the Pittsburgh Work Force Development Center, where claimant worked. Mr. Ewing testified, in part:

Q. (Mr. Short) Was it your understanding that Doug [claimant] had fallen on the ice outside?

A. (Mr. Ewing) I wouldn't call it ice. It was more of a snow/slush mix. Again, there was a broken section of curb there and I could see where he had slipped on that section and I could see where he'd impacted in the snow and he basically had to crawl to the back door from that point.⁴

Respondent argues that claimant broke his ankle either while walking or by tripping and falling and, therefore, argues claimant's injury is not compensable under the Workers Compensation Act as walking is an activity of daily living. Respondent relies upon K.S.A. 44-508(e), which states:

⁴ Ewing Depo. at 10.

“Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker’s usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. **An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.** (Emphasis added.)

The Workers Compensation Act was amended effective July 1, 1993, with the boldfaced portion of the above quoted statute being added. Unfortunately, the Act neither defines “disability” nor the phrase “normal activities of day-to-day living.” The Board, attempting to provide that phrase with a reasonable interpretation, concludes the legislature intended to codify the *Boeckmann*⁵ decision. In *Boeckmann*, the Kansas Supreme Court held that injuries from everyday bodily motions that gradually and imperceptibly eroded the body’s physical fibers were not compensable where it was clear that any movement on or off the job, regardless of the activity, caused injury. The Kansas Supreme Court said:

[T]here is no evidence here relating the origin of claimant’s disability to trauma in the sense it was found to exist in *Winkelman*. **No outside thrust of traumatic force assailed or beat upon the workman’s physical structure as happened in *Winkelman*.** . . .⁶ (Emphasis added.)

Contrary to respondent’s contention, claimant did not break his ankle as a result of merely walking down the sidewalk. Instead, claimant broke his ankle due to slipping on a slick surface, which caused him to fall.

Claimant’s injury occurred as the result of a sudden and traumatic event rather than due to an insidious erosion of his body from the natural aging process or everyday bodily motions of daily living. Because claimant sustained a sudden and traumatic accident, this claim is distinguishable from *Boeckmann*.

Accordingly, based upon the above, the Board concludes claimant sustained personal injury by accident.

2. Did claimant’s accident arise out of and in the course of his employment with respondent?

⁵ *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

⁶ *Id.* at 736.

The Judge found claimant's December 2000 accident arose out of and in the course of employment. The Board agrees.

Only those accidents that arise out of and in the course of employment are compensable under the Workers Compensation Act.⁷ And before an accident arises out of employment, there must be a causal connection between the conditions under which the work is performed and the resulting injury. An accidental injury arises "out of" employment if it arises out of the nature, conditions, obligations, or incidents of the employment.⁸

This court has had occasion many times to consider the phrase "out of" the employment, and has stated that it points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. . . .⁹

To arise "out of" employment requires some causal connection between the accidental injury and the employment. Whether an injury arises out of the worker's employment depends on the facts peculiar to the particular case.¹⁰

On the other hand, the phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the accident happened while the worker was at work in his or her employer's service.¹¹ And accidents that occur during breaks may be considered to have occurred in the course of employment under the personal comfort doctrine.

Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.¹²

⁷ K.S.A. 44-501(a).

⁸ *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

⁹ *Siebert v. Hoch*, 199 Kan. 299, 303, 428 P.2d 825 (1967).

¹⁰ *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 459, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992) (citations omitted).

¹¹ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

¹² 2 *Larson's Workers' Compensation Law*, Ch. 21 at 21-1 (2000).

The evidence establishes that claimant fell when he stepped outside respondent's building during a break from his regular work activities. The Board concludes claimant had not abandoned his employment at the time of the accident and, consequently, claimant's accident occurred in the course of his employment.

Furthermore, the Board concludes claimant's December 2000 accident arose out of his employment as it was directly related to the conditions of respondent's premises and the incidents of claimant's employment.

As the December 2000 accident arose out of and in the course of claimant's employment with respondent, claimant is entitled to receive benefits under the Workers Compensation Act.

3. What is the nature and extent of claimant's injuries?

Persuaded by a doctor appointed by another administrative law judge to evaluate claimant's injuries, Judge Frobish found claimant sustained a 40 percent permanent functional impairment to the left lower leg. The Board finds no reason to disturb that finding.

Dr. Michael P. Zafuta, an orthopedic surgeon, treated claimant's ankle with an open reduction and internal fixation of his left medial and lateral malleolus with screws. The doctor last saw claimant in late October 2001 and made a final diagnosis of nonunion of the fibula and mild post-traumatic arthritis of the ankle. Although the record is not entirely clear, it appears the doctor used the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (5th ed.), rather than the AMA Guides (4th ed.), in rating claimant's functional impairment to the left leg at 26 percent and lower leg at 37 percent.

In early March 2002, Dr. Edward J. Prostic examined claimant at the request of Administrative Law Judge Steven J. Howard for the purpose of providing an independent opinion regarding the extent of claimant's injury. The doctor diagnosed a nonunion of a displaced fracture in claimant's left ankle, which may eventually require additional medical treatment including an ankle arthrodesis. Dr. Prostic rated claimant's injury as comprising a 40 percent functional impairment to the lower leg. According to the doctor, the AMA Guides (4th ed.) does not include ratings for nonunion and, therefore, he formulated a rating that was appropriate for postoperative arthroplasty of a joint as claimant will eventually require either arthroplasty or arthrodesis.

In April 2002, at respondent's request claimant saw Dr. Philip R. Mills to be evaluated for purposes of this claim. The doctor diagnosed claimant as being status after a left bimalleolar fracture with open reduction and internal fixation and later partial

hardware removal. Using the *AMA Guides* (4th ed.), Dr. Mills rated claimant as having a 17.5 percent functional impairment to the left lower extremity.

In this instance, the Board is also persuaded by Dr. Prostic's functional impairment rating. Rather than being hired by either claimant or respondent, Dr. Prostic was requested to provide an unbiased opinion independent of the influence from either party. Consequently, the Board affirms the Judge's finding that claimant sustained a 40 percent functional impairment to the left lower leg.

4. Is respondent relieved from paying claimant temporary total disability benefits because it paid claimant other benefits during the period he missed work due to the December 2000 accident?

The Workers Compensation Act provides that an employer who voluntarily pays unearned wages in addition to or in excess of the disability benefits an injured worker is entitled to receive under the Act is entitled to a credit for any excess payment in any final lump sum settlement. The Act also provides, in certain situations, for an employer to withhold money from the worker's wages. Nonetheless, in no event is the employer entitled to a credit or offset when the unearned wages are paid pursuant to an agreement between the employer and worker or the labor organization to which the worker belongs. K.S.A. 44-510f(b) reads:

If an employer shall voluntarily pay unearned wages to an employee in addition to and in excess of any amount of disability benefits to which the employee is entitled under the workers compensation act, the excess amount paid shall be allowed as a credit to the employer in any final lump-sum settlement, or may be withheld from the employee's wages in weekly amounts the same as the weekly amount or amounts paid in excess of compensation due, but not until and unless the employee's average gross weekly wage for the calendar year exceeds 125% of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto. The provisions of this subsection shall not apply to any employer who pays any such unearned wages to an employee pursuant to an agreement between the employer and employee or labor organization to which the employee belongs.

The Board concludes respondent is not entitled to a credit under K.S.A. 44-510f(b). First, respondent did not raise that issue before Judge Frobish and, therefore, respondent is precluded from raising it for the first time on appeal. Second, respondent has failed to prove that it voluntarily paid claimant unearned wages. Third, the credit under K.S.A. 44-510f(b) is only applicable when there is a final lump sum settlement and the award entered in a litigated claim does not satisfy the definition of a final lump sum settlement.

The Board concludes claimant is entitled to temporary total disability benefits for the eight-week period from the date of accident through February 21, 2001. And respondent's request for a credit for other payments made to claimant during that period is denied.

Respondent, in the event the Board found claimant was entitled to temporary total disability benefits, requested the Board to order claimant to repay "the shared leave program his full pay for all weeks that are not directly attributable to his accrued shared leave."¹³ The Board must deny respondent's request. First, as indicated above, respondent has failed to prove that the payments it made to claimant during the period he was off work were made voluntarily. Second, the Board is unaware of any statute or appellate court decision that gives it the authority to order a worker to reimburse an employer for the sick leave, shared leave or any other benefit it receives from an employer.

AWARD

WHEREFORE, the Board affirms the November 13, 2003 Award.

IT IS SO ORDERED.

Dated this ____ day of February 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy A. Short, Attorney for Claimant
William L. Phalen, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹³ Respondent's Brief at 6 (filed Jan. 8, 2004).